

CENTRAL ARIZONA NATIONAL LAWYERS GUILD
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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF:

PETITION TO AMEND THE RULES
OF THE SUPREME COURT OF
ARIZONA: RULE 28, PROCEDURE
FOR ADOPTION, AMENDMENT,
AND ABROGATION OF COURT
RULES

SUPREME COURT NO. R-20-0022

COMMENT OF THE CENTRAL
ARIZONA NATIONAL LAWYERS
GUILD IN FAVOR OF THE
PETITION TO AMEND RULE 28
OF THE RULES OF THE ARIZONA
SUPREME COURT

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, the Central Arizona National Lawyers Guild (Central AZ NLG), respectfully submits this comment in support of the petition to amend Rule 28 of the Arizona Supreme Court concerning the Procedure for Adoption, Amendment, and Abrogation of Court Rules by requiring that this Court promote transparency of the judiciary in its decisions concerning petitions to amend the rules of Arizona's courts.

I. INTERESTS OF PETITIONER

The Central Arizona National Lawyers Guild is a local chapter of the National Lawyers Guild located in the greater Phoenix metropolitan area.

The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association and was the first one in the US to be racially integrated. Our mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests. This is achieved through the work of our members, and the Guild's numerous organizational committees, caucuses and projects, reflecting a wide spectrum of intersectional issues. Guild members effectively network and hone their legal skills in order to help create change at the local, regional, national, and international levels.

The NLG is dedicated to the need for basic change in the structure of our political and economic system. Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent

attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

The proposed amendment to Rule 28 aligns with Central AZ NLG's mission by promoting judicial transparency and accountability that will better enable Arizonans to make informed decisions when exercising their constitutional authority to retain justices under Article 6 Section 38 of the Arizona Constitution.

II. THE PROPOSED RULE ALIGNS WITH THE INTENT OF THE FRAMERS OF ARIZONA'S CONSTITUTION AND ENABLES VOTERS TO ACT PURSUANT TO ARTICLE 6 SECTION 38.

The Framers of the Arizona Constitution were determined to ensure that the provisions contained within the primary governing document for the state would not be undermined or abrogated by judicial fiat. *See* John Leshy, *The Arizona State Constitution* 21-23 (2nd. Ed. 2013). On August 15, 2011, President Taft vetoed a joint resolution of Congress that would have admitted Arizona into the Union because Arizona's Constitution included a provision permitting its citizens to recall judges through the ballot. *Id.* at 22.

Arizona voters responded by deleting the provision and resubmitting the proposed Constitution, which President Taft signed on February 14, 1912. *Id.* at 22.

However, Arizona voters immediately put a judicial recall amendment on the ballot, which voters passed by a margin of 50-1. *Id.*

The current mechanism for judicial recall is found in Article 6 Section 38 of the Arizona Constitution.

In 1992, Arizona voters approved the adoption of an amendment to Article 6 that would become Article 6, Section 42 of the Arizona Constitution. Leshy, *supra*, at 226-227. Perceived as a tacit concession that Arizona voters struggled in making informed decisions when casting votes to retain or recall judges and justices, Section 42 established a requirement that this Court adopt procedures for evaluating judicial performance. *Id.* at 227. The adoption of Article 6 Section 42 led to the creation of the Commission on Judicial Performance Review in 1993. *Id.*

Since 2006, the Commission's judicial evaluations are available online. The Commission's work is transparent and promotes confidence in the judiciary.

However, the public perception of this Court would only be improved by adoption of the proposed rule.

This Court has adopted the practice of holding public oral arguments in the vast majority of the cases that it decides. In addition to holding public oral arguments, this Court has embraced technology by livestreaming video and audio of the argument online and archiving them to ensure that the public has access. *See*

“Live & Archived Video” AZ.Courts.gov (available at <https://www.azcourts.gov/AZSupremeCourt>).

The adoption of the proposed rule would demonstrate this Court’s continued commitment to ensuring that Arizona voters are provided the information they need to make intelligent decisions when exercising their authority to recall or retain justices under Article 6 Section 38.

Additionally, the proposed rule would improve the efficiency of this Court’s rules forum process. That this Court receives and considers petitions to amend the rules of Arizona Courts from the public, including members of the bar and the judiciary, reflects a commitment to the people of the State of Arizona to ensure that the judiciary is responsive to the practical concerns of the public and developments of law that change over time. However, the current procedure for adopting or denying a rule petition provides no insight into the process that led to the result.

Perhaps the lack of public insight offered under the current procedure could explain why entities like the Maricopa County Attorney Office repeatedly submit substantially similar petitions year after year. (*See, e.g.*, R-20-0015 and R-19-0008) (repeat petitions seeking to prohibit juror contact after criminal cases). If this Court were to provide the public with reasons for a decision and included a poll of the justices, entities like the Maricopa County Attorney Office who repeatedly offer substantially similar petitions may be dissuaded from this practice.

Finally, the proposed petition cannot be considered in a political vacuum. Governor Ducey has taken two major steps in the last five years which have undermined the public's perception of the legitimacy of this institution.

First, Governor Ducey expanded the composition of this Court despite public declarations from this Court that an expansion was not needed to handle the caseloads of the Court. *See* Maria Polletta, "By adding justices to the Arizona Supreme Court, did Ducey help the state – or help himself?" *The Arizona Republic* (available at <https://www.azcentral.com/story/news/politics/arizona/2019/07/08/arizona-governor-said-expanding-supreme-court-would-bring-benefits-has-it-doug-ducey/2842733002/>).

Then, Governor Ducey appointed a controversial political figure, Maricopa County Attorney Bill Montgomery, to this Court after changing the composition of the Commission on Appellate Court Appointments, which had previously failed to vote in favor of nominating Justice Montgomery. (*See* Howard Fischer, "Behind the appointment: Montgomery to serve on Arizona Supreme Court." *The Daily Independent* (Sept. 5, 2019) (available at <https://www.yourvalley.net/stories/behind-the-appointment-montgomery-to-serve-on-arizona-supreme-court,78626?h>).

Governor Ducey's actions were beyond the control of this Court. However, it is undeniable that the Governor's actions have undermined public confidence in

the independence of Arizona’s judiciary. *See* “Fair Courts E-Lert: Arizona Court Makes Contentious Appointment to State Supreme Court” Brennan Center for Justice (Sept. 6, 2019) (available at <https://www.brennancenter.org/our-work/analysis-opinion/fair-courts-e-lert-arizona-governor-makes-contentious-appointment-state>); Mark Joseph Stern, “Arizona’s Governor is leading Republicans’ Quiet, Radical Takeover of State Supreme Courts: He may now be angling to appoint Bill Montgomery, Maricopa County’s reactionary prosecutor.” *Slate.com* (Aug. 29, 2019) (available at <https://slate.com/news-and-politics/2019/08/arizona-supreme-court-rigging-doug-ducey-bill-montgomery.html>).

By adopting the proposed rule, this Court would continue its tradition of transparency and ensure that voters are provided the information that they need to decide whether Governor Ducey’s appointments to this Court merit recall or retention.

III. CONCLUSION

The rules by which Arizonans seek and obtain justice in Arizona’s Courts are important. The process of proposing and debating new rules and amendments is transparent and democratic. The process that this Court undertakes to dispose of the petitions should also be transparent and reflective of the ideals espoused by our state constitution.

By adopting the proposed rule, this Court would only strengthen public perception of this Court's commitment to transparency, judicial independence, and the Arizona Constitution. The rules by which Arizonans seek and obtain justice in Arizona's Courts

For the reasons stated in this comment and the petition, this Court should adopt the proposed amended to Rule 28 of the Rules of the Supreme Court of Arizona.

Respectfully submitted May 6, 2020.

CENTRAL ARIZONA NATIONAL LAWYERS GUILD

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